In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 873

WABASH FIRE AND CASUALTY INSURANCE COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–4a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1965, and a petition for rehearing was denied on December 4, 1965. The petition for a writ of certiorari was filed on January 3, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the accused, by fleeing from the courtroom after the jurors had retired to consider their ver-

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dict, breached the conditions of a continuing bond for his appearance.

2. Whether the district court abused its discretion in ordering the accused's surety to pay $20,000 on a $25,000 appearance bond.

RULE INVOLVED

Rule 46, F.R. Crim. P., provides:

> (f) *Forfeiture.*
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> (2) *Setting aside.* The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.
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> * * * * *
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> (4) *Remission.* After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.
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STATEMENT

The United States District Court for the Western District of Kentucky entered judgment for $20,000 on a forfeited appearance bond against Rudolph Henry Kruse, Sr., an accused, and the petitioner, his surety (R. 47a–48a). On appeal (R. 48a), the conviction was affirmed (Pet. App. 1a–4a).

On February 25, 1963, Kruse was indicted for conspiracy and bank robbery violations of 18 U.S.C. 2113 (a) and (d) (R. 5a–7a). From that date until July 9, 1963, he was a fugitive (R. 35a). On July 9, 1963, he was surrendered by his attorney to agent Duncan and

posted a $25,000 bond with petitioner (for whom one Lawrence Detroy is an agent) as surety (R. 8a–10a, 35a, 40a–41a).

On October 25, 1963, Kruse appeared pursuant to a court order, and his trial was held (R. 35a–36a). At 5:01 p.m. the jury retired to consider its verdict (R. 56a). After the court had recessed to await the return of the jury, Detroy shook hands with Kruse, who walked toward the doorway of the Federal Building. When Detroy asked a deputy marshal whose prisoner Kruse was, the reply was that Kruse was not in the custody of the United States Marshal and that, if he were, he would not be walking out the door (R. 43a, 56a). Detroy then looked for Kruse in the vicinity of the courthouse but could not find him (R. 25a–26a). At about 5:55 p.m., the jury returned to the courtroom, but Kruse was not present (R. 56a). On the following day, with Kruse still absent, the jury found him guilty on Counts 1 and 2 of the indictment (R. 57a, 61a). On October 29, 1963, the government's motion for forfeiture of the bond was sustained (R. 2a). On November 27, 1963, F.B.I. agents apprehended Kruse in California as a result of their own investigation, independent of leads as to Kruse's possible whereabouts given to agent Duncan by Detroy (R. 39a, 26a). On December 23, 1963, Kruse was given concurrent sentences of five years' imprisonment on Count 1 and twenty years on Count 2 (R. 14a–16a).

On March 2, 1964, the government filed in the district court a motion for judgment on the previously forfeited bond in the amount of $25,000 (R. 16a). Petitioner filed a motion to set aside the bond for-

feiture or to remit judgment, supported by Detroy's affidavit (R. 19a–27a), and the government filed a response, also supported by affidavits (R. 30a–43a). In his affidavit, Detroy said that Kruse, after he was indicted, asked by telephone whether Detroy would make his bond if Kruse could get it cut, and that he (Detroy) reported this fact to F.B.I. agent Duncan, who told him to try to get Kruse to surrender and to tell him that nothing could be done while he was a fugitive (R. 23a). Detroy said that in order to help agent Duncan he agreed that the price for a $25,000 bond would be $1250 instead of the usual price of $2500 (R. 24a). He also said that he tried in every possible way to assist the government in apprehending Kruse (R. 26a). He found it difficult to estimate his expenses "because much was cash outlay to buy information" (R. 27a).

The affidavit of agent Duncan in support of the government's response admitted that Detroy had reported that he had been contacted by Kruse a number of times after October 1962 (R. 36a–38a). On October 28, 1963, according to the affidavit, Detroy told Duncan he had learned that Kruse allegedly had surrendered himself in July 1963 because his wife needed surgery, but that no surgery had been performed (R. 39a). The agent knew nothing about the arrangements regarding bond until Kruse fled on October 25, 1963 (R. 38a).

On May 20, 1964, the district court issued an order stating that "justice does not require the enforcement of the forfeiture in its entirety and judgment in the sum of $20,000 will be entered" (R. 45a–46a). On

June 5, 1964, petitioner filed a motion for partial remission of the judgment so that it would not exceed $6,239.80, the amount of the expenses incurred by the government in apprehending Kruse after his flight (R. 46a–47a, 32a). On the same day the court entered final judgment for $20,000, from which petitioner appealed (R. 47a–48a). The court of appeals affirmed *per curiam*.

ARGUMENT

1. Kruse did not, merely by appearing for trial on October 25, 1963, satisfy the conditions of the bail bond, as petitioner contends (Pet. 19–20). The bond required that Kruse appear in court on October 7, 1963, and "from time to time thereafter" at such times and places as required by the court's order, and that he "abide any judgment * * * by surrendering himself to serve any sentence imposed * * *" (R. 8a); it was a "continuing" bond which was to remain in effect until Kruse and petitioner were exonerated (R. 9a). Kruse's flight after the jury retired to consider its verdict rendered him unavailable for surrender under the sentence, a condition of the bond.

2. The district court acted within its discretion in remitting only $5,000 of the forfeiture on the $25,000 bond. *United States* v. *Peerless Insurance Co.*, 343 F. 2d 759 (C.A. 2), certiorari denied, 382 U.S. 832; *Larson* v. *United States*, 296 F. 2d 167, 170 (C.A. 8); *United States* v. *Davis*, 202 F. 2d 621, 625 (C.A. 7), certiorari denied *sub nom. Ferguson* v. *United States*, 345 U.S. 998. The court was not required to limit the judgment to $6,239.80, the amount of the expenses in-

curred by the government in apprehending Kruse. The contract in the bond contained no such limitation; it specified $25,000 as the definite amount to be paid upon default, and could have been enforced for the full amount. *E.g., United States* v. *Public Service Mutual Insurance Co.*, 282 F. 2d 771 (C.A. 2); *United Benefit Fire Insurance Co.* v. *United States*, 306 F. 2d 325 (C.A. 9). Detroy, who wrote the bond for his own profit, had to satisfy himself that the premium charged was sufficient to compensate for the risk involved; he was well aware of a possible liability for the full amount of the bond. And the district court took into consideration Detroy's attempts to assist in Kruse's apprehension when it remitted $5,000 of the forfeiture (R. 45a–46a).[1]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[1] *United States* v. *D'Argento*, 339 F. 2d 925 (C.A. 7), on which petitioner relies, is inapposite; the court of appeals there held that there should have been no forfeiture at all. The decision recognized that, where forfeiture is justified, the *amount* of remission—petitioner's principal complaint (see Pet. 14)—is within the discretion of the district court.

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